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≡ Navigation



INTERVIEW

Debating Cosmopolitan Law

CHRISTOPH BRENDDEL — 3 August, 2015



An interview with Immanuel Kant and Georg Friedrich von Martens (Part II)

Christoph Brendel

This is the second part of a fictional conversation with Immanuel Kant and Georg Friedrich von Martens. These two outstanding scholars never met face-to-face in real life but come together for a fictional debate, set sometime in the year 1801 in a country house a few miles outside of Königsberg. The matter in dispute will be Kant's idea of a cosmopolitan law. Von Martens, much as he respected Kant, was critical regarding the philosopher's novel concept. In the second edition of his 'Précis du droit des gens moderne de

l'Europe fondé sur les traités et l'usage' (1801) he had bluntly denied that cosmopolitan law was positive law at all.

Read [the first part of the conversation here](#) where the two scholars discuss their approach to international law and Kant starts to explain his concept of cosmopolitan law.

Brendel: Professor von Martens, does Professor Kant's explanation convince you that cosmopolitan law is necessary?

von Martens: Well, it has been interesting to listen to Mr. Kant's clarification as to the need for a cosmopolitan law. I understand that according to his theory there should be one. Yet again, I have to stress that there is no universal positive law among all nations and probably never will be.

Let us have a look at Europe. Even the international treaties and customary laws of the Turks differ in many points from the international law of the rest of our Christian Europe. On the other hand, outside of the European continent the newly independent United States of America have completely adapted to the European legal order (Précis, § 9). But, of course, they are former European colonies.

Looking beyond our own continent, I am familiar with the treaties and customs between the European powers and the non-European empires and states like very few others. My *Recueil des principaux traités* (7 vol., 1791-1801) as well as my *Cours diplomatique* (3 vol., 1801) contain ample evidence of the extensive legal relations that exist between Europe and other parts of the globe. However, the customs of the peoples in other parts of the earth, even of civilised ones, differ far too much from our own. They would not understand our notion of a science of the general, positive

European law of nations (Précis, § 9). If there is a society comprising all states and peoples, it can only be a natural one governed by natural law alone (ibid., §§ 1f.).

Brendel: Professor Kant, would you please respond to what your counterpart just said.

Kant: I fear we won't reach an agreement on that particular point. As I have mentioned already, I proceed from the general assumption that wherever humans can come into contact with each other, they have to leave the natural condition and establish a public legal constitution between them. All nations, regardless of their state of civilisation and geographical location, have to be brought into the light and protection of public law. A mere reference to the law of nature, with which Mr. von Martens contents himself, is unthinkable to me. Reason dictates that the status naturalis is a state of perpetual, even if not permanent, war – and we need to leave it and try to approximate perpetual peace. This is what prompted me to propose a cosmopolitan law, which requires nothing except the prerequisite for public law: its general public announcement (§ 34; Toward Perpetual Peace, appendix II).

Brendel: Let us talk about the substance of cosmopolitan law. Professor Kant, would you please give us a summary of its principles.

Kant: With pleasure. First of all, cosmopolitan law is analogous to international law in respect of its fundamental elements, namely the freedom and equality of all nations on our globe, be they small or large, civilised states or still savage nomads. Consequently, all peoples have an equal right to the territory in which they live. As you will know, I

have dealt with the issue of property in the first part of my Doctrine of Law which is traditionally known as natural law but I prefer to call it private law. Now despite all shortcomings of the law between nations in general – particularly its adjudication and enforcement which remains essentially in their own hands –, cosmopolitan law aims at securing the external mine and thine for those unprotected by international law. In view of the unspeakable wrongdoings of the Europeans all over the world during the last three centuries, who treated the inhabitants of other continents as nothing and their lands as *res nullius*, the idea of cosmopolitan law may help to prevent such wrongful invasions and usurpations in the 19th century (Toward Perpetual Peace, 3rd definitive article; Doctrine of Law, § 62).

In addition to this, I have presented hospitality as the central principle of cosmopolitan law. This was the lowest common denominator I could think of, uniting all the peoples of the earth. I have studied and taught anthropology for decades and I still read every new travel report I can get my hands on. It appears to me that since antiquity almost all the peoples of the earth have acknowledged the idea of hospitality in one way or another. Take, for instance, Constantin François Volney's account of the Arab Bedouins and how even they treat their guests in an extraordinary courteous manner. The principle of hospitality, therefore, is highly suitable to regulate the interaction between all nations of the earth in our endeavour to approximate perpetual peace.

In a nutshell, hospitality means that you have to treat foreigners coming along your shores or land borders in a non-hostile manner – provided, of course, they themselves

do not behave inhospitably or as enemies. Upon arrival, the visitors may declare their intentions and any form of relation between them and the host nation may ensue. But every people is basically free to turn down any request and ask the visitors to leave, unless they are in dire straits, such as in the case of shipwreck or similar emergencies. It is also permissible to deny certain nations, with whom you have already had negative experiences, entry to your territory or restrict them to particular places, as the Japanese and Chinese are doing vis-à-vis the Europeans.

Brendel: Professor von Martens, how do you deal with the problem of European incursions and colonialism overseas? And what do you think about the cosmopolitan principle of hospitality?

von Martens: I do not deny that there are many examples of usurpations by European powers in other parts of the globe, as, for instance, Guillaume-Thomas Raynal describes them in his *Histoire philosophique et politique des établissements et du commerce des Européens dans les deux Indes* (6 vols., 1st edition 1770). As to the acquisition of property through occupation, one of the basic requirements is, of course, that the object is actually *res nullius*. And the right to property is the same for all humans, irrespective of their religion or customs. Natural law does not authorise the Christian nations to appropriate the lands that are effectively occupied by the savages (*Précis*, § 36).

What Mr. Kant describes as the principle of hospitality strikes me as not so different from what I teach about the rights of foreigners to entry, passage and sojourn according to the European law of nations. Every state has exclusive authority over its territory and may decide for itself who

enters, passes through, resides or settles – and who does not. Only when a person's own preservation is in danger is it permissible to access another nation's soil without permission.

Yet, in comparison to previous ages today the European powers treat foreigners in a much more humane way, at least with regard to the European continent, leaving the colonies and overseas commerce here aside. In times of peace the states now generally grant the liberty of entry, passage, and sojourn through sea, land, and the majority of rivers. This liberty is confirmed in numerous treaties of peace, demarcation of borders and commerce, and acknowledged by general custom and the fundamental laws of several states. I spare you the details, but the trend is clearly towards a – in the words of my dear colleague – more hospitable world, at least in Europe (Précis, § 84; on the question of the European overseas commerce see *ibid.*, § 150).

Brendel: It seems to me that we have been able to clarify some issues regarding the concept of cosmopolitan law. We have, however, also encountered fundamental, possibly even insurmountable differences between the two of you. For now, I would like to thank you for the fascinating conversation. Professor Kant, thank you for making it possible despite your delicate health. Professor von Martens, we wish you a safe journey back to Göttingen.

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